(5)

No. 91-913

In The Supreme Court Of The United States

OCTOBER TERM, 1991

JOHN R. PATTERSON, TRUSTEE,

Petitioner,

v.

JOSEPH B. SHUMATE, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The Petitioner, John R. Patterson, Trustee, files this Reply Brief pursuant to Rule 15.6 of the Supreme Court Rules to address issues first raised in the Respondent's Brief in Opposition. These matters include:

(1) That adopting the Petitioner's view of 11 USC §541(a)(2) and 11 USC §522(b)(2) would cause onerous federal income tax consequences.

(2) That Shumate did not have unbridled control of the CFC Plan or CFC's assets.

(3) That the authority granted a bankruptcy trustee under 11 USC §548 to void fraudulent transfers vitiates the need to consider the questions raised concerning Sections 541(a)(2) and 522(b)(2).

ARGUMENT

1. The Respondent (hereinafter Shumate) raises in a footnote (Brief in Opposition Page 12, Footnote 3) the argument that finding for the Trustee could cause dire consequences to the retirement plan and its beneficiaries. Shumate bases this supposition on an Internal Revenue Service private letter ruling (Private Letter Ruling No. 89-10035, CCH Letter Ruling Reports 1988), but acknowledges that as a matter of law such private letter rulings cannot be cited as precedent.

The argument raised by this footnote is bogus. 29 USC §1056(d)(1) and 26 USC §401(a)(13)(A) require a qualified retirement plan to contain an antialienation provision. A plan must: "provide that benefits provided under the Plan may not be assigned or alienated."

The CFC Plan, having such a provision in its trust arrangement, has fulfilled all obligation imposed by either the Internal Revenue Code or Title 29 in that regard. That the Congress, through a provision in the Bankruptcy Code, has voided part of what the Plan provides in the antialienation provision gives rise to no inference that the Plan has failed to fulfill the statutory requirements for tax preferred status.

2. Shumate also contends that (Brief in Opposition Page 4) he did not have unbridled control of CFC's assets or the

CFC Plan, by virtue of a loan agreement between CFC and NCNB. This assertion is directly contrary to the findings of fact made by the District Court.

The loan agreement between NCNB and CFC had no relation whatsoever to the CFC Plan or Shumate's ability to terminate the Plan and receive his Plan benefits and the value of the CFC Plan reversion. Shumate would not have violated any contract to terminate the CFC Plan. The District Court considered Shumate's argument and rejected it outright.

> "The trust instrument and any reference documents control his powers, not the contract signed with the bank." See 19 Michie's Jurisprudence, Trust and Trustee's, §87 (1979). He could still terminate the Pension Plan and pay the proceeds out as a dividend. Although the consequences of these acts include acceleration of the note and liability for breach of contract, he nonetheless had legal control over the Pension Plan. Shumate surrendered the

> control for consideration, namely, the amount of the loan. Therefore, Shumate obtained benefits from rights he had as majority stockholder in control of the corporation. Even if the contract did change the legal right to control the trust, this Court believes Shumate would be estopped from asserting an act of his own will as a bar to an exercise of power he lawfully possessed. Petition for Writ of Certiorari, Page 25a.

3. The Brief in Opposition also raises as a new issue that a Bankruptcy Trustee's ability to pursue fraudulent conveyances of a debtor has some ameliorative effect on this controversy. This argument has no nexus to the central issue of this case: whether a controlling debtor's plan benefits are either excluded from his estate under §541(a) or exempt under §522(b)(2). A debtor's asset is either excluded or exempt under these sections as a matter of law. If the asset is of such a nature to be excluded or

exempt, then the question of whether it was transferred by an otherwise fraudulent means is moot.

CONCLUSION

The new matters raised by Shumate offer no reason to deny the Petition for Writ of Certiorari. The assertion of lack of control is directly contrary to the findings of fact by the District Court. The dour tax consequences insinuated by footnote are not supported by any recognizable legal authority and are contrary to the clear language of the Internal Revenue Code. The fraudulent conveyance issue is without a nexus to the issues raised by this case.

What is particularly striking about the Brief in Opposition is the failure to contest the arguments set forth by the Trustee as reasons for granting the Writ. Shumate does not contest the significant

existing conflict among the Courts of Appeal over the exclusion or exemption of a bankruptcy debtor's pension benefits from his bankruptcy estate. To the contrary, he recognizes this conflict exists (Brief in Opp. pp. 16, 18).

Shumate does not contest the conflict between the Circuits has created a morass of confusion in the lower courts nationwide over the issues raised by this case. Neither does Shumate contest the Trustee's argument that a Writ should be granted because of the inconsistency of federal law in this area.

Finally, Shumate does not contest the Petitioner's argument for granting the Writ that interpreting the "applicable nonbankruptcy law" language of §541(c)(2) to create an omnibus ERISA exclusion in bankruptcy, violates statutory rules of construction by effectively writing the

exemption scheme under §522 out of the Bankruptcy Code. Similarly, Shumate does not contest the Trustee's related argument that to find an omnibus federal exemption under 11 USC §522(b)(2) also violates rules of statutory construction because of the Bankruptcy Code's specific exemption scheme regarding pension benefits under 11 USC §522(d)(10)(E).

Accordingly, the Petitioner, John R. Patterson, Trustee, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in this cause on August 12, 1991.

Respectfully submitted,

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